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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1345

JAMES D. SULLIVAN,
PETITIONER,
v.
EDWARD J. CHOQUETTE
HARVEY BEIT
JONATHAN G. WELLS III
and
T. FRANCIS KELLEHER,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Respondents oppose the petition and pray that a writ of certiorari will not issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the case of *James D. Sullivan* v. *Edward J. Choquette et al.*, on December 30, 1969.

Opinions Below

The United States District Court for the District of Massachusetts wrote a Memorandum of Decision and Order of Dismissal granting respondents' motions to dismiss. That opinion has not been reported. It was not included in petitioner's Petition but is printed as Appendix A to this brief.

The opinion of the United States Court of Appeals for the First Circuit is reported at 420 F.2d 674. It is also printed as Appendix B to this brief.

Companion Cases

This petition is the latest of a long series of actions brought by petitioner against the respondents and others. Petitioner has reproduced some but not all of these in the Petition (p. 2). The complete list, which is relevant to an understanding of the Petition and of this brief, is as follows:

The District Court for the District of Massachusetts on June 26, 1968 wrote an opinion allowing the respondent Kelleher's motion to dismiss on the ground of judicial immunity. *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C. That opinion has not been reported.

The United States Court of Appeals for the First Circuit affirmed in an opinion reported in 405 F.2d 486. That opinion is printed at page 4a in the Appendices to the Petition.

In a second action the United States District Court for the District of Massachusetts granted the respondent Wells' motion for summary judgment. *Sullivan* v. *Choquette*, Civil Action No. 67-961-C. The opinion is reported in 289 F.Supp. 780.

The United States Court of Appeals for the First Cir-

cuit dismissed petitioner's appeal on February 21, 1969 for lack of prosecution. *Sullivan* v. *Choquette*, No. 7253.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes Involved

42 U.S.C. § 1983 *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985 *Conspiracy to interfere with civil rights — Preventing officer from performing duties*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending any such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986 *Same; action for neglect to prevent*

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Mass. G.L. c. 260, § 2A *Statute of Limitations.*

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within two years next after the cause of action accrues.

Questions Presented

1. Did the Court of Appeals correctly hold that petitioner's complaint was barred by the statute of limitations?
2. Did the Court of Appeals correctly hold that petitioner's complaint, to the extent that it alleged a claim for abuse of process, was barred by res judicata?
3. Did the Court of Appeals correctly hold that petitioner's complaint, to the extent that it alleged a claim for malicious prosecution, failed to state a cause of action upon which relief could be granted?
4. Did the Court of Appeals correctly hold that, since petitioner without dispute received actual notice of the pendency of a state court action, there was no constitutional defect in the service of process so as to warrant a federal court's granting equitable relief from the effects of the state court's judgment?

Statement of the Case

Petitioner commenced this action in the United States District Court for the District of Massachusetts on October 30, 1968. The Complaint purported to state claims for abuse of process and for malicious prosecution. The complaint also purported to state a claim under the Civil Rights Act of 1871. 42 U.S.C. §1983, 1985 and 1986.

The respondent Kelleher was sued in his capacity as Clerk of the District Court of Newburyport, Massachusetts. The respondent Choquette was sued as the former lessor

to Sullivan of a house in Newburyport. The respondents Wells and Beit are law partners in Newburyport. No facts were alleged pertaining to the respondent Beit except that he was associated with Wells in the practice of law.

The District Court allowed motions to dismiss filed by all respondents on May 27, 1969. See Appendix A hereto.

The petitioner appealed, and the United States Court of Appeals for the First Circuit on December 30, 1969 affirmed the decision below. See Appendix B hereto.

The complaint below was the latest of a long series of actions brought in the federal courts by petitioner, *pro se*, against the various respondents. A brief description of those suits is essential to a description of this case, and to respondent's argument that the petition for certiorari should be denied.

Plaintiff first sued respondent Kelleher for damages for deprivation of petitioner's constitutional rights in that Kelleher, as clerk of the state court, allegedly entered a default judgment against petitioner in an eviction action with knowledge that legal notice of the suit had not been properly given. The United States District Court for the District of Massachusetts dismissed the complaint on June 26, 1968 on the ground of judicial immunity. *Sullivan* v. *Kelleher,* Civil Action No. 67-919-C. The Court of Appeals affirmed. *Sullivan* v. *Kelleher,* 405 F.2d 486 (1st Cir. 1968).

Petitioner also filed a petition for a writ of error in the Superior Court for Essex County, Massachusetts on December 1, 1967, which was dismissed for lack of jurisdiction on October 14, 1968. *Sullivan* v. *Choquette,* Essex Superior Court No. 139,788. No appeal was ever taken from that judgment. (See Court of Appeals Appendix, p. 133).

Petitioner also brought suit for abuse of process, malicious prosecution, slander and breach of the lease of the premises from which he had been evicted, against respon-

dents Choquette and Wells and one Jean MacDonald. The District Court on September 30, 1968 granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette,* 289 F.Supp. 780 (D.Mass. 1968), appeal dismissed for want of prosecution, No. 7253 (1st Cir., Feb. 21, 1969).[1]

The petitioner then instituted the present action, again alleging abuse of process, malicious prosecution and violation of his civil rights.

There is presently pending in the Massachusetts Supreme Judicial Court for Essex County a petition for a writ of error, instituted by petitioner on February 7, 1970 — since the time of the Court of Appeals decision here complained of — against the respondent Choquette and the Justices of the District Court of Newburyport, involving the same subject matter. *Sullivan* v. *Choquette et al.,* Supreme Judicial Court for Essex County No. 2663.

Through all of petitioner's repeated suits against the respondents, there has run a common, recurring thread of allegations. In the case below petitioner alleged that he is a resident of New Jersey; that in July 1965 he entered into a written lease with the respondent Choquette for one year's occupancy of a house in Newburyport; that in November 1965, while petitioner was absent from Massachusetts on business, Choquette commenced an action of eviction against petitioner for non-payment of rent in the District Court of Newburyport, Massachusetts, and caused a four-

[1] Petitioner has brought suit on behalf of his minor daughter against the four respondents and MacDonald seeking to perpetuate the testimony of some seventeen persons including respondents, in anticipation of a tort action allegedly arising from events connected with the transaction at bar. On May 27, 1969 the District Court granted motions by all defendants to dismiss that petition for failure to state a claim and for failure to show, as required by Rule 27(a)(1), Fed. R. Civ. P., that petitioner was presently unable to bring or cause the cause of action to be brought. *Kimberly Sullivan* v. *Edward J. Choquette et al.,* Civil Action No. 68-984-G (D.Mass.).

teen-day notice to quit to be served upon petitioner; that a Deputy Sheriff made service of the writ or summary process (eviction) by leaving a copy of the writ at the rented house,[2] which was the petitioner's last and usual place of abode and where petitioner's wife found it; that petitioner's wife telephoned petitioner in Florida and advised him of the pendency of the action; that petitioner wrote to the Court from Florida stating that he viewed the service as improper and would accept service only by mail at an address in California (Court of Appeals Appendix, pp. 9, 30); that petitioner then returned to Massachusetts and was physically present in Newburyport between December 14 and December 20, 1965; that the case was continued; and that, the defendant having failed to answer or otherwise appear in the case, the state court summary process action terminated in a judgment for Choquette on December 30, 1965 and the issuance of an execution for petitioner's eviction on January 7, 1966 (Court of Appeals Appendix, pp. 9, 56-59).

The complaint below also alleged that, on January 29, 1966, in exchange for a five-day extension, the petitioner, then represented by counsel, signed a written agreement that he would voluntarily quit the premises within that period; and that the premises were in fact vacated by that time (Court of Appeals Appendix, pp. 13-14).

The complaint is replete with additional allegations which, in substance, sought to challenge the underlying procedure in the District Court of Newburyport and which describe unrelated and irrelevant events. No factual allegations were addressed to actions of the respondent Beit except broad charges of conspiracy.

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[2] With each retelling, petitioner's version of the story becomes embellished. In Paragraph V of the Complaint (Court of Appeals Appendix, P. 7) petitioner states that service was made by leaving the notice "in the storm porch enclosure". In his present petition (P. 8) he for the first time says the notice was found "lying on the front lawn of the premises".

All four defendants filed motions to dismiss the complaint, and the District Court granted all such motions on May 27, 1969. See Appendix A. The District Court's decision was based on four separate grounds:

1. That the suit, whether in tort or for violation of the Civil Rights Act, was barred by the statute of limitations;
2. That the suit was barred by the doctrine of res judicata in view of judgments in several earlier actions involving the same parties;
3. That the complaint failed to state a cause of action upon which relief could be granted; and
4. That, as to the respondent Kelleher, the suit was barred by the doctrine of judicial immunity.

In view of its decision the District Court, because of lack of independent jurisdiction, did not rule on the respondent Kelleher's counterclaim for an order enjoining petitioner from bringing additional suits arising from the transaction at bar.

The Court of Appeals affirmed on December 30, 1969. See Appendix B. This petition seeks to challenge that decision.

Argument

This case is not appropriate for review by this court on a petition for certiorari for several compelling reasons.

1. This case presents no important or significant question of law to be resolved by this Court. The issues which petitioner seeks to raise do not involve questions which affect persons other than the litigants. The case, rather, is uniquely confined to the narrow, factual allegations of this particular litigation.

This is not a case involving a conflict between the

decisions of more than one circuit, nor does it concern a ruling below which conflicts with a prior decision of this court. No question of important constitutional dimension is raised. The case, instead, involves comparatively clear-cut issues as to the statute of limitations, judicial immunity and the *res judicata* effect of prior decisions on the identical questions.

2. There is presently pending in the Massachusetts Supreme Judicial Court for Essex County a petition for a writ of error commenced by petitioner against the respondent Choquette and others. That action involves an attack against the lower state court proceeding from which petitioner's alleged grievance — underlying this action and all his earlier actions — stems. It involves the same basic challenge to the underlying state court action which petitioner sought to raise in the lower federal courts, as indicated by the statement in Paragraph II of the Complaint that petitioner "is seeking a judgment equivalent to the Massachusetts State Court 'Writ of Error', primarily", and as buttressed by his assertion at page 18 of his brief in the Court of Appeals:

> "These errors are only correctable by a Writ of Error on the state latitude . . . "

Thus petitioner is now having his day, once again, in the state court, and this court with its crowded docket should decline to hear this case.

In that connection, this court should also consider that the present petition and supporting record are so cluttered with vague and confusing material that an inordinate demand would be placed on this Court were it to grant the petition.

3. The decisions below were clearly correct, and were based on several compelling grounds, any one of which justifies this court's declining to grant the petition.

(a) RES JUDICATA. The courts below correctly held that petitioner was barred from maintaining this action against the respondents for abuse of process and malicious prosecution by the *res judicata* effect of the earlier proceeding in which essentially the same grounds for relief were asserted against the respondents. In *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782-83 (D.Mass. 1968), the district court ruled that these claims were insufficient as a matter of law and entered judgment for the respondent Wells.

"A judgment is an absolute bar to a subsequent action on the same claim." *United States* v. *International Building Co.*, 345 U.S. 502, 504 (1953). A judgment also serves as a bar to later actions on the same claim against persons (in this instance, respondent Beit) who were in privity with the parties to the prior suit. *Mendez* v. *Bowie*, 118 F.2d 435, 440 (1st Cir. 1941). Thus the court below was correct in ruling that the prior judgment barred this action insofar as the complaint alleged abuse of process and malicious prosecution.

The courts below likewise correctly held that the prior judgment barred the allegations in this suit that petitioner's civil rights were violated. A prior judgment serves as a bar to a subsequent suit which, although differing in form, is identical in substance. *Astron Industrial Assoc.* v. *Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968); see *Fiumara* v. *Sinclair Refining Company*, 385 F.2d 395 (3rd Cir. 1967). Some of the various tests advanced for determining whether subsequent actions are identical were outlined in *Acree* v. *Air Line Pilots Assoc.*, 390 F.2d 199, 201 (5th Cir. 1968):

> "Is the same right infringed by the same wrong? Would a different judgment in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"

See *Astron Industrial Assoc.* v. *Chrysler Motors Corp.*, supra, and cases therein cited at 961-62. By any of these tests, petitioner's effort to breathe fresh air into his now exhausted claim must fail. The courts below correctly held that *res judicata* also barred the asserted claim of a cause of action under the Civil Rights Act.

By the same token, the courts below properly held that petitioner's claims against the respondent Kelleher were barred by the rulings that he was protected by the doctrine of judicial immunity, as had previously been held in the case of *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, affirmed, *Sullivan* v. *Kelleher*, 405 F.2d 486 (1st Cir. 1968).

(b) STATUTE OF LIMITATIONS. The courts below were clearly correct in ruling that this action was barred by the statute of limitations.

The causes of action asserted against the respondents sought recovery for abuse of process and for malicious prosecution, both of which are torts under Massachusetts law. *Ledgehill Homes, Inc.* v. *Chaitman*, 348 Mass. 777 (1964); *Quaranto* v. *Silverman*, 345 Mass. 423 (1963); *Hubbard* v. *Beatty & Hyde*, 343 Mass. 258 (1961). The Massachusetts statute of limitations applicable to actions in tort, Mass. G.L. c. 260, §2A, establishes a limitation period, absent specific exceptions not here relevant, of two years after the cause of action accrues. The causes of action here accrued, at the latest, on February 4, 1966 — the last date complained of in the complaint. Yet the complaint in the present action was not filed until more than two years later, on October 30, 1968. Accordingly, the district court was correct in ruling that Mass. G.L. c. 260, §2A barred so much of the complaint as alleged abuse of process and malicious prosecution.

Petitioner's complaint also purported to assert a cause of action under the Civil Rights Act of 1871. It is well-settled, however, that actions brought under the Civil

Rights Act are governed by the applicable state statute of limitations. *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914); *Francis* v. *Lyman*, 108 F.Supp., 884, 885 (D.Mass. 1952), *affirmed sub nom. Francis* v. *Crafts*, 203 F.2d 809 (1st Cir. 1953), cert. denied, 346 U.S. 835 (1953). Thus the district court below correctly ruled that the two-year statute of limitations of Mass. G.L. c. 260, §2A also barred any cause of action under the Civil Rights Act.

(c) FAILURE TO STATE A CLAIM. The Court of Appeals was clearly correct, as was the district court in an earlier proceeding, *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782 (D.Mass. 1968), in ruling that petitioner's complaint failed to state a cause of action for malicious prosecution. There is no allegation that the prior proceedings terminated in a manner favorable to plaintiff, an indispensable element of the tort. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 170 (1961).

Likewise, the courts below rightly held that the complaint failed to state a cause of action for abuse of process, as had another judge of the district court in the earlier decision of *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782-83 (D.Mass. 1968), for there was no allegation that the process here was used for some ulterior motive other than that for which it was intended. *Gabriel* v. *Borowy*, 324 Mass. 231, 236 (1949); *Noyes* v. *Shanahan*, 325 Mass. 601, 605 (1950); *Ross* v. *Peck Iron & Metal Company*, 264 F.2d 262, 268 (4th Cir. 1959).

The district court below was also plainly correct in ruling that the case failed to state an actionable claim under the Civil Rights Act.

The courts below were justified in ruling that the complaint failed to state a claim based upon defects in service of process. There has never been any dispute but that petitioner here actually received notice of the pendency of the state court action, or that he had in fact returned

to Massachusetts long prior to the entry of judgment against him on December 30, 1965.

For this reason, the Court of Appeals was also clearly correct in ruling that petitioner's case did not justify the exercise of equitable jurisdiction to relieve petitioner from the effects of the state court judgment.

Conclusion

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

May 6, 1970

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 68-983-G

Civil Action No. 68-983-G

JAMES D. SULLIVAN,

PLAINTIFF

v.

EDWARD J. CHOQUETTE ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION AND ORDER OF DISMISSAL

May 27, 1969

GARRITY, J. This case arises upon plaintiff's complaint against four individual defendants brought for the stated purpose of effecting reversal of a writ of summary process entered by the Newburyport District Court and for damages allegedly arising from the fraudulent issuance and procurance of the writ. The court presently has before it various motions, including motions by each defendant to dismiss the complaint and a motion by the plaintiff for summary judgment on defendant Kelleher's counterclaim for an order enjoining plaintiff from bringing additional suits arising from the transaction at bar.

The facts upon which this complaint is premised have been before this court twice previously[1] and are reported in *Sullivan* v. *Choquette*, D. Mass., 1968, 289 F.Supp. 780. For the purposes of consideration of the defendant's

[1] In *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, defendant's motion to dismiss was allowed on June 26, 1968, on the ground that defendant was judicially immune. The judgment was affirmed, *Sullivan* v. *Kelleher*, 1 Cir., 1968, 405 F.2d 486.

In *Sullivan* v. *Choquette*, Civil Action No. 67-961-C, defendants' motions to dismiss were allowed on September 30, 1968, reported at 289 F.Supp. 780. Appeal docketed, No. 7253, 1 Cir., was dismissed for lack of prosecution on February 21, 1969.

presently pending motions, the facts alleged by the resisting party are, of course, assumed to be true.

I

Each defendant asserts multiple grounds in support of his motion for dismissal. Since the motions must be granted, only some of these grounds need be specifically discussed by the court.

1. *Statute of Limitations.* All defendants have moved to dismiss on the ground that the statute of limitations has run. This suit, whether in tort or for violation of the Civil Rights Act, 42, U.S.C. §§1983, 1985 and 1986, is governed by the applicable Massachusetts statute of limitations. The most analogous and applicable Massachusetts statute of limitations is that of Mass. G.L. c. 260, §2A, which provides a two-year limitation for all but certain specified actions which are not related to that at bar. Cf. *Mulligan* v. *Schlachter,* 6 Cir., 1968, 389 F.2d 231, *Henig* v. *Odorioso,* 3 Cir., 1967, 385 F.2d 491, cert. den. 390 U.S. 1016, rehearing den. 391 U.S. 929. Since the last of the defendants' acts complained of took place not later than February 4, 1966, this suit, which was filed on October 30, 1968, is barred by the statute of limitations.

2. *Judicial immunity.* Defendant Kelleher has moved to dismiss on the ground of judicial immunity. All of Kelleher's acts which are complained of where acts within the scope of his duties as clerk of the Newburyport District Court. Kelleher is therefore immune from suit on the ground of judicial immunity. *Sullivan* v. *Kelleher,* 1 Cir., 1968, 405 F.2d 486.

3. *Res judicata.* Each defendant has moved to dismiss on the ground of res judicata. The facts recited in the complaint in this case are identical to those in two suits in this court previously brought by plaintiff and dismissed.[2] Each defendant in this case was a defendant in one of those

[2] See footnote 1 above.

two cases except defendant Beit, who is joined here solely as a law partner of defendant Wells and who is not alleged to have otherwise been involved. The previous suit against defendant Kelleher (C.A. No. 67-919-G) was premised both in tort and under the Civil Rights Act of 1871, as is this case, and is therefore res judicata on all issues raised in this case against defendant Kelleher. The previous suit against defendants Choquette and Wells (C.A. No. 67-961-C) was brought in tort with jurisdiction based upon diversity of citizenship; that suit did not claim a cause of action under the Civil Rights Act of 1871. To the extent that plaintiff's claim is in tort for malicious prosecution or abuse of process, the judgment in that case (C.A. No. 67-961-C) is res judicata since it involves the identical cause of action and facts. Restatement of Judgments §50 (1942); 1B, Moore, Federal Practice, Para. 0.409(1) at 1005 (2nd ed. 1965). Plaintiff's claim against defendant Beit is barred to the same extent that it is against defendants Choquette and Wells by C.A. 67-961-C since his alleged involvement in a malicious prosecution or abuse of process is no more than derivative from that of defendant Wells. The remainder of this suit, plaintiff's claim under the Civil Rights Act of 1871 that defendants Choquette, Wells and Beit have by conspiracy prevented plaintiff from receiving due process of law in courts of the Commonwealth of Massachusetts, is of the same purport and substance as plaintiff's prior suit for malicious prosecution and abuse of process (C.A. 67-961-C) and therefore is also barred under the doctrine of res judicata. See *Mendez* v. *Bowie*, 1 Cir., 1941, 118 F.2d 435; see also 1B, Moore, Federal Practice, Para. 0.409(1) at 1005-1008 and Para. 0.410(1) and (2) at 1151-1184 (2nd ed. 1965); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 826-828.

4. *Failure to state a cause of action.* Plaintiff's complaint alleges that the defendants have conspired and act-

ed under the color of law to deprive plaintiff of his civil rights. "State proceedings do not become civil rights matters by generalized, not to mention unsupported, allegations . . . " *Ronan* v. *Stone*, 1 Cir., 1968, 396 F.2d 502, 503. There is in this complaint no statement of a claim as required by Fed. R. Civ. P. 8 to support plaintiff's allegation of a denial of his civil rights. Plaintiff's complaint, therefore, fails to state a cause of action upon which relief may be granted.

II

In view of the allowance of defendants' motions to dismiss, the motion of defendant Wells to dissolve attachment is granted, all other motions pending in this case are denied, and defendant Kelleher's counterclaim is dismissed for want of independent jurisdiction. Cf. *Strachman* v. *Palmer*, 1 Cir., 1949, 177 F.2d 427; see also *United Mine Workers* v. *Gibbs*, 1966, 383 U.S. 715.

So ordered.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges*

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Jonathan G. Wells et al., appellees.

December 30, 1969

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d

jurisdiction is invoked under the civil rights provisions, 28 U.S.C. §1343 (1964) and 42 U.S.C. §§1983, 1985 (1954), and the diversity statute, 28 U.S.C. §1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 17 (1961); W. Prosser, Torts §§113-14 (3rd ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective. that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction to grant relief from the effects of such a judgment in an appropriate case.[2] 7 J. Moore, Federal Practice ¶60.36 (2nd ed. 1968). This is not, however, such a case.

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486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette*, 289 F.Supp 780 (D. Mass. 1968), *appeal dismissed for want of prosecution*, No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

To the extent that this action states a claim for abuse of process, the district court was correct in dismissing it. Such a claim is plainly concluded by the decision in *Sullivan I* as well as barred by the statute of limitations. Moreover, the dismissal of the complaint as to defendant Kelleher was clearly proper, as his immunity from suit was conclusively determined by our decision in *Kelleher, supra.*

[2] Equitable relief against the state judgment, under some circum-

Service of process in the state case was made by leaving the writ at the demised premises in accordance with Mass. G.L.A. ch. 223, §31. Plaintiff received actual notice of service from his wife, who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965); Restatement of Judgments §32, comments a, f, and g (1942); see *Wagner* v. *Wagner*, 293 F.2d 533 (D.C. Cir. 1961); *Schultz* v. *Walker*, 130 F.2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. James, *supra* §12.11, at 650-51. Since plaintiff in this case had actual notice, we find no defect in the service of process. The district court was therefore correct in dismissing this aspect of the complaint for failure to state a claim and, since there has not been a favorable termination of the state eviction proceeding, the court was also correct in dismissing the malicious prosecution count.

Affirmed.

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stances, could arguably constitute a favorable termination of the prior suit for purposes of bringing an action for malicious prosecution. Since we do not grant relief against the state judgment, however, we express no opinion on the merits of this issue.